Dato' Mohamad Bustaman Abdullah v Malay Mail Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 23 NCVC-101–08 OF 2012
YEOH WEE SIAM J
8 NOVEMBER 2013

Tort — Defamation — Defences — Fair comment — Newspaper report containing facts and events that transpired in court proceedings — Report not 100% true and accurate but true and accurate for greater part of it — Whether defence of fair comment available — Whether fair and accurate report of occasion in which privileged statements were made — Whether matter was of public interest

Tort — Defamation — Defences — Justification — Newspaper report containing facts and events that transpired in court proceedings — Report not 100% true and accurate but true and accurate for greater part of it — Whether defence of justification available

Tort — Defamation — Defences — Qualified privilege — Newspaper report containing facts and events that transpired in court proceedings — Report not 100% true and accurate but true and accurate for the greater part of it — Failure of defendants to verify information — Whether defence of qualified privilege available

Tort — Defamation — Libel — Newspaper report of court proceedings — Allegation by plaintiff that report portrayed him as rude and inconsiderate lawyer who was impolite and non-compliant of judge's directions — Report not 100% true and accurate but true and accurate for greater part of it — Whether defamation established — Whether defence of justification available — Whether defence of fair comment available — Whether defence of qualified privilege available

The plaintiff was an advocate and solicitor. The first defendant was a newspaper company and the second defendant was employed by the first defendant as a news reporter. The second defendant attended the trial of a civil suit ('the trial') as a reporter to report the trial proceedings in the first defendant's newspaper. An article was later published in the first defendant's newspaper and online website containing four statements which the plaintiff claimed were defamatory of him. The plaintiff alleged that the words complained of referred to him and were understood and/or imputed to mean

that he was, in the eyes of the public, a rude and inconsiderate lawyer who had used impolite words during the cross-examination of a witness, and was non-compliant of the High Court judge's directions during the trial. The plaintiff further alleged that the words complained of are entirely and completely false and untrue.

Held, dismissing the plaintiff's claim with no order as to costs:

(1) The plaintiff's full name was cited in the article. There was no doubt that the words or statements contained in the article referred to the plaintiff. It was also clear that the article was written by the second defendant and published by the first defendant (see paras 14 & 17).

(2) The statements, published in the original context of the article, in their natural and ordinary meaning did impute to the plaintiff by depicting and implying the plaintiff's professional personality and character as that of a rude and inconsiderate lawyer; depicting and implying that the plaintiff completely ignored the judge's direction and was an advocate and solicitor who was impolite and non-compliant of the judge's directions; that the plaintiff's impolite and non-compliant conduct caused the judge to become angry so as to cause the judge to suddenly leave and/or walk out of the court room; and that the plaintiff used improper phrase and was putting questions to the witness until he was told by the judge to refrain from doing so. The words complained of in the statements would expose the plaintiff to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right-thinking members of society generally (see paras 21–22).

(3) To succeed in the defence of justification, the burden of proof is on the defendants to prove that the defamatory imputation is true. To a large extent, the second defendant reported in the article the truth of the facts and the events that transpired in the proceedings of the trial. She did use the words 'squirm in discomfort' without verifying it with the others in the court room, when she should have been more cautious to do so. She assumed that the judge was angry when in actual fact the judge was upset for personal reasons due. However, even though the article was not 100% true and accurate, but it was found to be true and accurate for the greater part of it. Hence, the defendants could avail themselves of the defence of justification. The parts of the article which were not completely true had not materially injured the plaintiff's reputation having regard to the truth of the remaining parts of the article (see paras 27 & 53–54).

(4) The court's evaluation of the four statements vis a vis the defence of fair comment was somewhat similar to that for the defence of justification except that here, the court focused on the test of whether the four statements were made fairly and were in fact a fair and accurate report of

the occasion in which privileged statements were made. The defence of fair comment was available to the defendants. Although some parts of the article were words consisting partly of fact and partly of expression of opinion and the various paragraphs were not arranged in the usual chronological sequence, but the second defendant had reported fairly and accurately, including giving fair comment and her opinion. Even if not every allegation of fact was proved eg the statements that the plaintiff made those present in court squirm in discomfort, and that the judge was angry, the expression of opinion by the second defendant was fair comment having regard to the facts of the situation in the court proceedings in the trial (see paras 56–58).

(5) The plaintiff did not adduce any cogent evidence to prove malice on the part of the defendants. On the other hand, the second defendant stated that her comments made were based on honest and fair observations of what happened in the trial. The article did not appear to be written out of malice by the second defendant (see para 61).

(6) The defence of fair comment can only apply if the matter is of public interest. Here, the article was regarding the trial which was of public interest ie on the issue as to who owned the three tiger stripes design on the national jersey as an intellectual property (see para 62).

(7) In relation to the defence of qualified privilege, the defendants did have a legal, social or moral duty to publish the article which contents regarding the trial and the proprietorship of the three tiger stripes in the national jersey was of interest to the recipients or readers of the article. However, the defendants did not verify the information with the judge, the plaintiff and other persons present in the court on whether those present in court were squirming in discomfort, and whether the judge was angry with the plaintiff and left the Court room out of the blue. Hence, the defendants could not avail themselves of the defence of qualified privilege since the defendants could have gone a step further to carry out some verification before publishing the article with a dramatic and sensational slant (see paras 66 & 68–69).

[Bahasa Malaysia summary

Plaintif merupakan seorang peguambela dan peguamcara. Defendan pertama merupakan syarikat surat khabar dan defendan kedua diambil bekerja oleh defendan pertama sebagai seorang wartawan berita. Defendan kedua menghadiri perbicaraan satu guaman sivil ('perbicaraan') sebagai seorang wartawan untuk melaporkan prosiding perbicaraan dalam akhbar defendan pertama. Artikel yang kemudiannya diterbitkan dalam akhbar defendan pertama dan laman web dalam talian mengandungi empat penyataan ynag mana plaintif mendakwa adalah memfitnahnya. Plaintif mendakwa bahawa perkataan-perkataan diadukan merujuk kepadanya dan difahami dan/atau

dikaitkan dengan bermaksud bahawa dia, di mata orang ramai, merupakan seorang peguam yang kurang ajar dan tidak bertimbang rasa yang menggunakan perkataan yang tidak menyenangkan semasa menyoal balas seorang saksi dan tidak patuh dengan arahan hakim Mahkamah Tinggi semasa perbicaraan. Plaintif selanjutnya mendakwa bahawa perkataan-perkataan yang diadukan keseluruhannya dan sepenuhnya palsu dan tidak benar.

Diputuskan, menolak tuntutan plaintif tanpa perintah berhubung kos:

(1) Nama penuh plaintif dipetik di dalam artikel tersebut. Tiada keraguan bahawa perkataan-perkataan atau penyataan-penyataan yang terkandung dalam artikel merujuk kepada plaintif. Adalah jelas bahawa artikel tersebut ditulis oleh defendan kedua dan diterbitkan oleh defendan pertama (lihat perenggan 14 & 17).

(2) Penyataan-penyataan, diterbitkan dalam konteks asli artikel tersebut, dalam maksud sifat dan kebiasaannya ada menyalahkan plaintif dengan menggambarkan dan membayangkan personaliti profesional dan karakter plaintif sebagai seorang peguam yang kurang ajar dan tidak bertimbangrasa; menggambarkan dan membayangkan bahawa plaintif mengabaikan sepenuhnya arahan hakim dan merupakan seorang peguamcara dan peguambela yang tidak sopan dan tidak patuh kepada arahan hakim; bahawa ketidaksopanan plaintif dan tindakan ketidakpatuhan tersebut mengakibatkan hakim tiba-tiba bangun meninggalkan dan/atau keluar daripada bilik mahkamah; dan bahawa plaintif menggunakan frasa yang tidak sepatutnya dan menyoal saksi sehingga beliau diberitahu oleh hakim untuk menahan diri daripada berbuat demikian. Perkataan-perkataan yang diadukan dalam penyataan akan mendedahkan plaintif kepada kebencian, cemuhan atau penghinaan di dalam minda seorang yang munasabah atau boleh merendahkan plaintif dalam anggapan pemikiran rasional ahli masyarakat secara keseluruhannya (lihat perenggan 21–22).

(3) Untuk berjaya dalam pembelaan justifikasi, beban bukti terletak ke atas defendan-defendan untuk membuktikan bahawa tohmahan fitnah adalah benar. Untuk sebahagian besarnya, defendan kedua melaporkan di dalam artikel mengenai kebenaran fakta-fakta dan peristiwa yang berlaku dalam prosiding-prosiding perbicaraan. Dia memang menggunakan perkataan 'berkeadaan tidak selesa' tanpa mengesahkan bersama yang lain di dalam bilik mahkamah, apabila dia sepatutnya lebih berhati-hati untuk berbuat demikian. Dia menganggap bahawa hakim tersebut marah apabila dalam fakta sebenarnya hakim tersebut terganggu atas sebab-sebab peribadi. Walau bagaimanapun, walaupun artikel tersebut bukanlah 100% benar dan tepat, tetapi ia didapati benar dan tepat untuk sebahagian besarnya. Oleh itu, defendan-defendan boleh menggunakan pembelaan justifikasi. Bahagian artikel yang tidak

sepenuhnya benar tidak secara material mencederakan reputasi plaintif dengan mengambil kira kebenaran bahagian artikel yang tinggal (lihat perenggan 27 & 53–54).

(4) Penilaian mahkamah mengenai empat penyataan iaitu ulasan saksama adalah agak serupa dengan pembelaan justifikasi kecuali bahawa di sini, mahkamah memfokuskan ke atas ujian sama ada keempat-empat penyataan dibuat secara adil dan bahawa sebenarnya merupakan laporan adil dan tepat mengenai peristiwa di mana kenyataan istimewa dibuat. Pembelaan ulasan saksama diberikan kepada defendan-defendan. Walaupun beberapa bahagian artikel terdapat perkataan-perkataan yang sebahagiannya adalah fakta dan sebahagiannya merupakan ungkapan pendapat dan beberapa perenggan tidak disusun di dalam urutan kronologi seperti kebiasaannya, tetapi defendan kedua telah melaporkan secara adil dan tepat, termasuk memberikan ulasan saksama dan pendapatnya. Walaupun bukan setiap dakwaan fakta dibuktikan contohnya penyataan bahawa plaintif membuat sesiapa yang berada di mahkamah berkeadaan tidak selesa, dan bahawa hakim tersebut marah, ungkapan pendapat oleh defendan kedua merupakan ulasan saksama dengan mengambil kira fakta-fakta situasi dalam prosiding mahkamah di dalam perbicaraan (lihat perenggan 56–58).

(5) Plaintif tidak mengemukakan apa-apa keterangan kukuh untuk membuktikan niat jahat bagi pihak defendan-defendan. Sebaliknya, defendan kedua menyatakan bahawa komen-komennya dibuat berdasarkan pemerhatian jujur dan adil mengenai apa yang berlaku semasa perbicaraan. Artikel tersebut tidak kelihatan ditulis dengan niat jahat oleh defendan kedua (lihat perenggan 61).

(6) Pembelaan ulasan saksama hanya boleh digunakan sekira perkara tersebut mengani kepentingan awam. Di sini, artikel adalah berhubung perbicaraan yang merupakan kepentingan awam iaitu mengenai isu bahawa siapa yang memiliki tiga rekabentuk jalur harimau pada jersi kebangsaan merupakan satu harta intelek (lihat perenggan 62).

(7) Berhubung dengan pembelaan hak keistimewaan, defendan-defendan sememangnya mempunyai tanggungjawab dari segi undang-undang, sosial atau moral untuk menerbitkan artikel di mana isi kandungannya berhubung perbicaraan dan milikan tiga jalur harimau di jersi kebangsaan adalah untuk kepentingan penerima-penerima atau pembaca-pembaca artikel. Walau bagaimanapun, defendan-defendan tidak memeriksa maklumat dengan hakim, plaintif atau orang lain yang hadir di mahkamah mengenai sama ada sesiapa yang hadir di mahkamah berkeadaan tidak selesa, dan sama ada hakim marah dengan plaintif dan meninggalkan kamar mahkamah dengan tiba-tiba. Oleh itu, defendan-defendan tidak boleh menggunakan pembelaan hak keistimewaan memandangkan defendan-defendan sepatutnya terlebih

dahulu melakukan pengesahan sebelum menerbitkan artikel dari sudut yang dramatik dan sensasi (lihat perenggan 66 & 68–69).]

Notes

For cases on libel, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 523–723.

For cases on defences, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 425–449.

Cases referred to

Abdul Rahman Talib v Seenivasagam & Anor [1965] 1 MLJ 142b (refd)

Abdul Rahman Talib v Seenivasagam & Anor [1966] 2 MLJ 66, FC (refd)

Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315; [1989] 1 CLJ 321, HC (refd)

Brent Walker Group plc and another v Time Out Ltd and another [1991] 2 All ER 753, CA (refd)

Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371; [1999] 1 CLJ 461, CA (folld)

Jones v Skelton [1963] 3 All ER 952, PC (folld)

Keluarga Communication v Normala Samsuddin [2006] 2 MLJ 700, CA (refd)

Reynolds v Times Newspapers Ltd and others [1999] 4 All ER 609, HL (refd)

S Pakianathan v Jenni Ibrahim [1988] 2 MLJ 173, SC (refd)

Syed Husin Ali v Sharikat Pencetakan Utusan Melayu Berhad & Anor [1973] 2 MLJ 56; [1973] 1 LNS 146 (refd)

Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v Bre Sdn Bhd & Ors [1996] 1 MLJ 393; [1995] 1 LNS 340, HC (refd)

Legislation referred to

Defamation Act 1957 ss 8, 9, 12(1)

Sukri Mohamed (Mahendra Kumar Balakrishnan, Adhuna Kamarul Ariffin and Fardlin Izreen bt Mustafar with him) (Bustaman) for the plaintiff.

Jahaberdeen Mohamed Yunos (Jahaberdeen & Co) for the defendants.

Yeoh Wee Siam J:

WRIT OF SUMMONS AND STATEMENT OF CLAIM

[1] This is a claim by the plaintiff against the defendants, inter alia, for an injunction and general damages, including compensatory damages and

aggravated damages, based on the cause of action in defamation for libel.

BACKGROUND FACTS

[2] The plaintiff is an advocate and solicitor of the High Court of Malaya.

[3] The first defendant is a registered company carrying on its primary business of news reporting through newspapers and newspaper distribution.

[4] The second defendant at the material time was an employee of the first defendant, holding the position of news reporter.

[5] The second defendant attended the whole trial of Civil Suit No 22IP-02–01 of 2012 between Majlis Sukan Negara ('MSN') against Mesuma Sports Sdn Bhd ('Mesuma') and the registrar of Trade Marks Malaysia (as an interested party) ('the MSN case') as a reporter to report the trial proceedings in court from 21 June 2012 to 27 June 2012 in the first defendant's newspaper.

[6] The article in dispute entitled, 'Judge Walks Out As Questions Turn Personal' ('the article') published in the first defendant's newspaper, *The Malay Mail*, dated 27 June 2012 (CBOD1 Pt B p 40) and correspondingly published online in the website of the first defendant at http://malaymail.com.my (CBOD1 Pt B pp 41–43 at p 41) contained the following statements being the words complained of by the plaintiff:

The first Statement:

NSC lawyer Datuk Mohamed Bustaman did not mince with his words in cross-examining Olympic Council Malaysia (OCM) honorary secretary Datuk Sieh Kok Chi, even when the subject zoomed in on Sieh's disabled daughter, making those present at the court, including judge Datuk Hanipah Farukillah, squirm in discomfort.;

The second Statement:

Judge Datuk Hanipah Farukillah then asked (National Sports Council lawyer) Mohamed Bustaman Abdullah to move on with other questions, but he persisted with it.;

The third Statement:

Out of the blue, Hanipah who looked angry, walked out of the room without uttering a word.;

The fourth Statement:

Please use proper phrases when putting questions to the witness and try not to indicate that the government is the owner of the design, 'Hanipah said'.

('the four statements').

[7] The plaintiff alleged that the words complained of, as contained in the above four statements in the article, are defamatory of him and further alleged that in the plain, natural and ordinary meaning, the words complained of referred to him and are understood and/or imputed to mean that he was, in the eyes of the public, a rude and inconsiderate lawyer who had used impolite words during the cross-examination of a witness, and was non-compliant of the High Court judge's directions.

[8] The plaintiff further alleged that the words complained of are entirely and completely false and untrue (see PW1-WS Q18 to 21).

[9] The defendants in their statement of defence:

(a) Denied that the words complained of are defamatory of the plaintiff and that in their plain, natural and ordinary meaning, they are capable of bearing the meanings as alleged by the plaintiff.

(b) In the alternative, the defendants relied on the defence of justification, fair comment and qualified privilege.

ISSUES

[10] The main issues in this case are:

(a) Whether the four statements are defamatory of the plaintiff; and

(b) If so, whether the defence of justification, fair comment and qualified privilege are available to the defendants to relieve the defendants from liability to the plaintiff.

BURDEN OF PROOF

[11] The burden of proof lies on the plaintiff to prove that:

(a) the words or statements complained of contained in the article refer to the plaintiff;

(b) the words or statements contained in the article are defamatory; and

(c) the words or statements contained in the article were published.

(see *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315; [1989] 1 CLJ

321).

EVALUATION AND FINDINGS

[12] For proper understanding and determination of the issues, it is important to read the four statements in their original context (see Court of Appeal decision in *Keluarga Communication v Normala Samsuddin* [2006] 2 MLJ 700 at p 708 on the requirement to take into account the context and circumstances of the publication).

[13] The full article containing the four statements reads as follows:

Judge walks out as questions turn personal

'ATTACK' seemed to be the mode of the day at the Intellectual Property High Court here, against defence witnesses called to testify in the 'tiger stripe' design case between the National Sports Council ('NSC') and Mesuma Sports Sdn Bhd.

NSC lawyer Datuk Mohamed Bustaman did not mince his words in cross-examining Olympic Council Malaysia (OCM) honorary secretary Datuk Sieh Kok Chi, even when the subject zoomed in on Sieh's disabled daughter, making those present at the court, including judge Datuk Hanipah Farukillah, squirm in discomfort.

Mohamed Bustaman asked Sieh, the third defence witness, why his disabled daughter often travelled with him to foreign countries as a council board member when she was not one.

To this, Sieh, who maintained a calm composure, said that as a board member, he was entitled to bring a guest whenever he travelled overseas.

'I am a single parent and my daughter is handicapped. There is no one to take care of her and as such, she travels with me', said Siah, 74.

He said he paid for her expenses, including her flight tickets.

Mohamed Bustaman then asked Sieh whether he knew pregnant shooter Nur Suryani Mohd Taibi, who came into the limelight recently when she wanted her husband Marhazli Mohtar to accompany her to the London Olympics instead of national rifle coach Saidov Isroil.

Sieh said he knew her and her request after reading reports in the newspapers.

Mohamed Bustaman linked Nur Suryani's case to Sieh's by asking him why Marhazli was not allowed to follow his wife overseas whereas Sieh's daughter could do so.

Judge Datuk Hanipah Farukillah then asked Mohamed Bustaman to move on with other questions, but he persisted with it.

Out of the blue, Hanipah, who looked angry, walked out of the court room without uttering a word.

When the proceedings resumed five minutes later, Mohamed Bustaman apologised to both Hanipah and Sieh.

Please use proper phrases when putting questions to the witness and try not to indicate that the government is the owner of the design,'Hanipah said.', (Emphasis added.)

(a) Whether the words of statements contained in the Article refer to the plaintiff

(b) Whether the words or statements contained in the Article were published

[14] The plaintiff's full name is cited in the article. There is no doubt that the words or statements contained in the article refer to the plaintiff.

[15] There is no dispute by the defendants that the article regarding the trial of the MSN case was published on Wednesday, 27 June 2012, in *The Malay Mail* newspaper at p 6 of news, and on the first defendant's website on the same day at 13:14 hours.

[16] In fact, in para 10 of the statement of agreed facts, both parties have agreed that, 'The first defendant had on or before 6 July 2012 removed and/or withdrawn the said article from the first defendant's website'.

[17] Therefore, it is clear that the article was written by the second defendant and published by the first defendant.

(c) Whether the words or statements contained in the article are defamatory

[18] In deciding whether the words are defamatory, reference is made to *Gatley on Libel and Slander*, (6th Ed) at p 4 para 4:

> There is no wholly satisfactory definition of a defamatory imputation. Any imputation which may tend 'to lower the plaintiff in the estimation of right thinking members of society generally', 'to cut him off from society,' or 'to expose him to hatred, contempt or ridicule,' is defamatory of him. An imputation may be defamatory whether or not it is believed by those to whom it is published.

[19] Further, at p 14 para 31 *Gatley* stated:

> A defamatory imputation is one to a man's discredit, or which tends to lower him in the estimation of others, or to expose him to hatred, contempt or ridicule, or to injure his reputation in his office, trade or profession, or to injure his financial credit. The standard of opinion is that of right-thinking persons generally. To be defamatory an imputation need have no actual effect on a person's reputation; the law looks only to its tendency.

(see also *Syed Husin Ali v Sharikat Pencetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56; [1973] 1 LNS 146 and *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393; [1995] 1 LNS 340).

[20] In the Court of Appeal decision in *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371 at p 374; [1999] 1 CLJ 461 at p 374; Gopal Sri Ram JCA stated:

> … the first task of a court, in an action for defamation, is to determine whether the words complained of are capable of bearing a defamatory meaning. And it is beyond argument that this is in essence a question of law that turns upon the construction of the words published.

As Lord Morris put it in *Jones v Skelton* [1963] 3 All ER 952 at p 958:

> The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words (see *Lewis v Daily Telegraph Ltd* [1963] 2 All ER 151). The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader, guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction, would draw from the words.
>
> …
>
> In my judgment, *the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory* …
>
> Having decided whether the words complained of are capable of bearing a defamatory meaning, the next step in the inquiry is for a court to ascertain *whether the words complained of are in fact defamatory*. This is a question of fact dependent upon the circumstances of the particular case. (Emphasis added.)

[21] Applying the above principles to the present case, the court finds that the four statements, published in the original context of the article, in their natural and ordinary meaning do impute to the plaintiff by:

The first statement

That the plaintiff, as an advocate and solicitor, had used impolite and/or non-courteous words during the cross-examination of Dato' Sieh Kok Chi ('Dato' Sieh') (DW2) over the questions revolved on Dato' Sieh's disabled daughter thereby depicting and implying the plaintiff's professional personality and character as that of a rude and inconsiderate lawyer. This caused everyone who were present in court, including the High Court Judge ('the judge'), to be uncomfortable;

The second statement

That the judge had asked the plaintiff to move on with another question but

the plaintiff persisted with his earlier line of question thereby depicting and implying that the plaintiff completely ignored the judge's direction and is an advocate and solicitor who is impolite and non-compliant of the judge's directions;

The third statement

That the plaintiff's impolite and non-compliant conduct caused the judge to become angry and/or upset so as to cause the judge to suddenly leave and/or walk out of the court room, without uttering a word;

The fourth statement

That the plaintiff was using an improper phrase and putting questions to the witness and trying to indicate that the government is the owner of the design until he was told by the judge to refrain from doing so.

[22] The words complained of in the four statements would expose the plaintiff to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right-thinking members of society generally (see *Tun Datuk Patinggi Haji Abdul Rahman*'s case, and *Syed Husin Ali*'s case).

[23] This was confirmed by the evidence of the plaintiff's friend, Mansur Bin Ghazali (PW2) who read the article in the *Malay Mail* newspaper. PW2 stated that the article by *Malay Mail* had pictured the plaintiff as a rude, difficult, and inconsiderate lawyer, who was disrespectful of the judge and stubborn in his attitude and behaviour in court, and a very uncontrollably aggressive person. The plaintiff had caused the judge to get angry and made the judge leave the court. PW2 had known the plaintiff for 39 years and he had never known the plaintiff to be an aggressive, rude or impolite person. When PW2 met the plaintiff about a week later, PW2 asked the plaintiff in jest, about how come the plaintiff managed to make a judge walk out of court.

[24] Vedhagiri Vallipan @ Omar ('PW3), who read the article online on the first defendant's website, stated that he had known the plaintiff for almost two and a half years now as his mentor friend and tennis partner. According to PW3, the article implied that the plaintiff is an insolent, rude, insistive, stubborn and aggressive lawyer in court, and had misbehaved in court until even the judge left the court. The judge even told off the plaintiff to use proper phrases when questioning the witnesses.

[25] On 2 July 2012, PW3 emailed the plaintiff asking him about what was happening now that the judge was walking out and it seemed like the plaintiff had unleashed a 'doppelgagger', meaning that an entirely different person in

character appeared in court than the actual person that the plaintiff is by character and personality whom PW3 knows (CBOD 3 Pt B p 3).

THE DEFENCE

[26] In view of the court's above finding that the four statements are defamatory of the plaintiff, the next issue is whether the defendants can be relieved from liability by availing themselves of the defence of justification, fair comment and qualified privilege raised by them.

Justification

[27] To succeed in this defence of justification, the burden of proof is on the defendants to prove that the defamatory imputation is true (see *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub*'s case and Federal Court decision in *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173).

[28] Counsel for the defendants submitted that the evidence shows clearly that the words complained of are substantially true in fact and substance. He drew the court's attention to the notes of proceedings ('NOP') (CBOD1 Pt B pp 44–170) of the MSN case from pp 94–98. All the questions from pages 94–98 pertain to Dato' Sieh's daughter. The plaintiff, under cross-examination, had agreed to this.

[29] The court has perused the NOP of the MSN case and found that the plaintiff had asked Dato' Sieh ('DW2') questions on three occasions regarding Dato' Sieh's disabled daughter (note: 'PC' in the NOP refers to the plaintiff in the present case, who was the plaintiff's counsel in the MSN case, and 'DW3'refers to Dato' Sieh):

The first Time (page 94 of CBOD1 Pt. B, Q.58 of NOP):

PC : So she was travelling with you as a member of OCM Board?

DW3 : YA not really. Because you see I'm a Secretary General, I am entitled to a guest, the privilege of having a accompanying guest whom I have the right to appoint, I mean whether my daughter or my spouse. But I am actually a single parent and my daughter is handicapped and nobody looking after her. So she goes along with me everywhere. And everybody knows her and everybody loves her. But this time she has actually … So that is the reason why I take her along.

At this point, Dato' Sieh clarified to the court that the status of his disabled daughter was as an accompanying guest.

The second time (CBOD 1 Pt. B page 97. Q.67 OF NOP):

PC : That you can allow your daughter to be there together?

DW3 : Yes. I am entitled to a guest.

The third time (CBOD1 Pt B p 97. Q.68 of NOP):

For the third time, again the same question regarding Dato Sieh's disabled daughter was asked by the plaintiff:

PC : Can you show us anywhere in the Bundle that that is your entitlement under the OCM charter?

DW3 : Not in the OCM Charter, it is in the participation of the games organizing committee because when it comes to participation or attendance to the games, the decision is also made by the organizing committee of that particular games. YA, like I mentioned in the Olympic Games it is clearly stated that are two places, one is reserved for the President and one is for the Secretary General and they are entitled to bring along an accompanying guest, just like in the thing also said is that the head of state is entitled to how many guest how many entourage how many bodyguards. All these are stipulated in black and white.

Clearly, Dato' Sieh was asked by the plaintiff three times to clarify to the Court about the status of his disabled daughter as an accompanying guest.

[30] The judge then told the plaintiff at Q70 of NOP at CBOD1 Pt B p 98:

Court:Dato, I do not mean to interject but I believe the witness has at least on two occasion tries, stated that the status of the … his daughter is as an accompanying guest. So maybe you want to ask questions from different aspect but not to repeat the same question.

[31] In the context of Q 58, 67, 68 and 70, and pp 94 to 98 of the NOP, it can be seen that the judge had to intervene to direct the plaintiff to move on to the next questions from a different aspect because the plaintiff was repeating the same question regarding Dato' Sieh's disabled daughter.

[32] The plaintiff then replied the judge:

PC : *Much apologies Maam* but there are a few irregularities that we are trying to point out (see minutes 11.30.44am in Item No 21, court recording transcription (CRT) dated 26 June 2012 for MSN case at p 171 of CBOD1 Pt. B) (Emphasis added.).

[33] By the fact that the plaintiff apologised to the judge, it shows that the plaintiff admitted that he had been repeating the same question regarding Dato' Sieh's disabled daughter and he had to move on to the next aspect of questioning.

[34] Thus the first and second statements made by the second defendant, and which were published by the first defendant, are true.

[35] The second defendant did not verify with all the other persons in court, including the judge, whether they felt uncomfortable by the plaintiff's repeated questions regarding Dato' Sieh's daughter. However, the second defendant had the feeling that people were not comfortable. The expression 'squirm in discomfort' is rather exaggerated and made graphic, but basically it was used to convey the meaning that those present in court were not comfortable at all over the repeated questioning by the plaintiff of Dato' Sieh's disabled daughter. Even the judge had to step in to tell the plaintiff to move on to other questions, and the plaintiff then had to apologise to the court for his repeated manner of questioning Dato' Sieh.

[36] As for the third statement, the second defendant testified that she was sitting at the back row, middle portion, of the court room. She was looking down and writing her notes on the proceedings and looking up every now and then to observe the proceedings. She saw the judge suddenly leaving the court room without uttering a word. She did not hear the judge saying anything; she got the impression that the judge looked angry.

[37] The court's video recording on 26 June 2011 at 11.33.29am of the whole episode, which was played several times in this court, showed the following (CBOD1 Pt. B p 171, and Q 73 to 76 of NOP at CBOD1 Pt B at pp 99 and 100):

> 73. PC:Do you know a lady by the name of Lee Siu Kheng?
>
> DW:Yes YA.
>
> 74. PC:Who is she to you?
>
> DW:She is actually helping my daughter as well because my daughter has reached the stage where she will tend to fall and sometimes … And I as a man, is not really correct for me to really look after her private needs.
>
> 75. PC:That's why you need to bring an additional guest?
>
> DW3:Yes Your Honor.
>
> 76. PC:Why do you have to actually bring her and list her under the OCM list when the fact that if the reason is for her to look after your daughter? Why don't you just leave her at home looking after your daughter?

Because YA, I can't leave my daughter. Sometimes I do leave my daughter with friends, but I am still her father and my daughter wants to come with me most of the time. To tell you the truth YA, I sometimes feel like I'm neglecting my daughter, I mean every parent feels that way especially when … you know my daughter is already 38 years old and she has been living with me since she was eight years old. I mean we had a very very bad divorce and since then, I have been both her father and mother to my daughter. For 30 years and she's very close to me. So I really feel guilty going away for more than a few days and living her alone with friends and all this sort of things. But really YA, I can openly say here that the most important person in my life is my daughter. But sometimes I have to do other things as well because I cannot. I cannot … I mean it's so depressing to be with my daughter all the time when I know I am so helpless and I can't help her. Sorry if I burden you with this story.

Court: Stand down for 10 minutes.

(Court adjourned at 11.33am)

(Court resumed at 11.47am)

PC: Terlebih dulu, saya memohon maaf kalau sekiranya ada yang tersinggung, termasuk saksi.

Court: Please proceed.

PC: I'm just doing my job as an officer of the court.

Court: Yes.

[38] When I viewed the court's video recording of the proceedings in the MSN case, I noted that Dato' Sieh was still in the midst of giving his testimony when suddenly the judge got up to leave the court room. It was not audible and it could not really be heard the words of the judge/court saying 'Stand down for 10 minutes' when she left the court room.

[39] Dato' Sieh ('DW2'), in the present case, testified in his re-examination about what happened at the material time in the MSN case:

As I was really engrossed in explaining to the honourable Judge, and I don't really not notice or hear because *suddenly* I saw the people rose *and the Court was stopped and the proceeding was stopped so I was much surprised and shocked as anybody else la*. Because I was really quite err emotional at that time, I mean, for whatever reason, that I was quite emotional and engrossed arr. But like I said, I'm not blaming anybody, *because later Dato Bustaman, came and apologise to me, privately, as well as in court*, he said he's doing his job and I understand that he's doing his job. So there was no malice or intention or anything on me, on my part. (Emphasis added.)

[40] I asked Dato' Sieh why was he shocked. Dato Sieh gave this answer:

> Because your honour, it's first time I come to Court and I … I … I …, not very, I have no experience in such a proceeding, and then suddenly everybody stood up I was a little bit late in standing up, so, so, I didn't know what happened actually. Why why why the proceeding was abruptly stopped for whatever it was lah.

[41] From the video recording and Dato' Sieh's testimony in the MSN case, and Dato's Sieh's evidence in the present case, the court finds that, in fact, it does appear abrupt to anyone sitting in the court during the proceedings in the MSN case that the judge suddenly got up from her chair, even though Dato' Sieh was still talking and giving his evidence, and left the court room. The second defendant said that she did not hear the words of the judge saying 'Stand down for 10 minutes'. She saw the judge leaving the court room out of the blue, abruptly, and the judge's exit from the court was not preceded by the court staff calling out 'court bangun' as is the usual practice in court proceedings when a judge leaves the court. The second defendant got the impression that the judge was angry and left the court room.

[42] The truth of the matter is revealed by the plaintiff's own evidence. He informed the court that after the judge left the court room, the judge called both counsel to her chambers. This is what the plaintiff stated (PW1-WS Q27 and A):

> During the ten minute recess, I was called in chambers before the Learned High Court Judge together with counsel for the defendant in the MSN case. *We were then informed by the Learned Judge that she apologises for abruptly calling for a recess* as she was overcome by emotions due to the testimony of Dato Sieh about his daughter. The Learned Judge also informed us that she was emotional due to the testimony as she could relate the circumstance akin to those of hers due a recent loss in Her Ladyship's family. Despite the learned judge had explained herself, *I had regardless apologised in the event if I had offended Her Ladyship or the Court*. I was then told by the learned judge to proceed with my line of questioning of Dato Sieh as she was aware of the purpose of my cross-examination. (Emphasis added.)

[43] Under cross-examination, the plaintiff admitted that 'abruptly' means 'all out of a sudden', and that another word for 'out of a sudden' is 'out of the blue'.

[44] The second defendant had used the expression 'out of the blue' in the third statement. In my view, the second defendant has not used the wrong words. To her and Dato' Sieh, it does appear to be true that out of the blue, when Dato' Sieh was still giving his evidence, the judge abruptly or suddenly left the court room.

[45] The second defendant was not completely correct in her perception that the judge left the court room because the judge was angry. The second

defendant thought that the judge was angry. However, in actual fact, in the words of the plaintiff, the judge was 'overcome by emotions due to the testimony of Dato Sieh about his daughter' and "she was emotional due to the testimony as she could relate the circumstance akin to those of hers due to a recent loss in her Ladyship's family.', and the judge 'apologises for abruptly calling for a recess as she was overcome by emotions due to the testimony of Dato Sieh about his daughter'.

(The court further notes that the NOP of the MSN case reveal that Dato Sieh's daughter is physically and intellectually handicapped, and Dato' Sieh has been taking care of her as a single parent, as her father and mother, from the time she was 8 years old until 38 years old then. Dato' Sieh was 74 years old then, as stated in the article).

[46] The NOP at CBOD1 Pt B p 100 show that when the court in the MSN case resumed at 11.47am, after adjourning at 11.33am, the plaintiff apologised to the court, 'Terlebih dulu, saya mohon maaf kalau sekiranya ada yang tersinggung, termasuk saksi.'

[47] Given the circumstances of the MSN case, the second defendant wrote the third statement based on what she truly saw and what she perceived the situation to be.

[48] As for the fourth statement, the NOP of the MSN case at CBOD1 Pt B p 149 show the following context of why the second defendant wrote the fourth statement:

> Court:Dato' if I may just enlighten that since this is the core dispute for the court to decide, I think please try to use words that do not indicate that the copyright is owned by the government. This is matter for the court to determine. Maybe you may wish to use the right word to put the question to the witness. Thank you.

[49] Under cross-examination, the plaintiff admitted that the Judge did say those words in the fourth statement to him. Thus, the fourth statement is a statement of truth by the second defendant.

[50] In *Carter-Ruck on Libel and Privacy* (6th Ed) p 177 at para 9.1, the learned author stated:

> If the words are true, the publication is not actionable.

[51] After hearing the evidence of the second defendant, the court is satisfied that the defendants have succeeded in raising the defence of justification.

[52] Section 8 of the Defamation Act 1957 ('Act 286') provides:

Justification

8 In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, *a defence of justification shall not fail by reason only that the truth of every charge is not proved* if the words not proved to be true do no materially injure the plaintiff's reputation having regard to the truth of the remaining charges. (Emphasis added.)

[53] To a large extent, the second defendant reported in the article the truth of the facts and the events that transpired in the proceedings of the MSN case on 26 June 2012. She did use the words 'squirm in discomfort' without verifying it with the others in the court room, when she should have been more cautious to do so. She assumed that the judge was angry when in actual fact the judge was upset for personal reasons due to the manner of cross-examination by the plaintiff of Dato' Sieh regarding his daughter. However, even though the article is not 100% true and accurate, but it is found to be true and accurate for the greater part of it, the court holds that the defendants can avail themselves of the defence of justification under s 8 of Act 286 (see also *Abdul Rahman Talib v Seenivasagam & Anor* [1965] 1 MLJ 142b, and affirmed in [1966] 2 MLJ 66 per Barakbhah CJ).

[54] Seen from this standpoint, I do not think that the parts of the article which are not completely true had materially injured the plaintiff's reputation having regard to the truth of the remaining parts of the article. It must be borne in mind again that the plaintiff had apologised to the judge after the recess. He had also apologised to Dato' Sieh in the MSN case. That was the actual scenario.

Fair comment

[55] Section 9 of Act 286 provides:

Fair comment

9 In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.

[56] The court's evaluation of the four statements vis a vis the defence of fair comment is somewhat similar to that for the defence of justification except that here, the court focused on the test of whether the four statements were made fairly and were in fact a fair and accurate report of the occasion in which

privileged statements were made (see *Brent Walker Group plc and another v Time Out Ltd and another* [1991] 2 All ER 753).

[57] After evaluating the total evidence, I am of the view that the defence of fair comment is available to the defendants. The second defendant herself admitted that some parts of her article are words consisting partly of fact and partly of expression of opinion. She further admitted that the various paragraphs are not arranged in the usual chronological sequence, but she had reported fairly and accurately, including giving fair comment and her opinion.

[58] On the whole, the courts is satisfied that even if not every allegation of fact is proved eg the statements that the plaintiff made those present in court squirm in discomfort, and that the judge was angry, the expression of opinion by the second defendant is fair comment having regard to the facts of the situation in the court proceedings in the MSN case.

[59] The second defendant is an experienced court reporter, having covered court proceedings for about three years already. She had written several other articles regarding the MSN case, including coverage of the plaintiff as counsel for the plaintiff in that case. Those other articles do not result in any defamation suit against her or her employer (see CBOD2 Pt B pp 1, 2–4, 5, 6, 7–9, 10, 11–13, 17, and 18).

[60] The plaintiff alleged that the second defendant had malice in authoring and writing the four statements as well as causing the article to be published by the first defendant's newspapers whilst defaming the plaintiff and his reputation as an advocate and solicitor and senior member of the Malaysian Bar. The defendants attempted to obtain some form of self-gain with pure malice at concocting or creating a sensationalistic story which was not based purely on actual facts so as to sell more of the first defendant's newspapers to the Malaysian public.

[61] The court finds that the plaintiff did not adduce any cogent evidence to prove malice on the part of the defendants. On the other hand, the second defendant stated that her comments made were based on honest and fair observations of what happened in the MSN case. Upon reading the article as a whole, I am of the view that the article does not appear to be written out of malice by the second defendant. The first defendant did use the headlines, 'Judge walks out as questions turn personal'. The second defendant's opening words for the article appear to be dramatic and catchy when she stated 'ATTACK' seemed to be the mode of the day at the Intellectual Property High Court … The defendants did make the article sensational by the headlines and the opening words of the article, but those words are part of the manner and

style of journalistic writing and reporting and do not convey the meaning that the defendants published the article due to malice against the plaintiff.

[62] The defence of fair comment can only apply if the matter is of public interest. Here, there is no doubt that the article is regarding the MSN case which is of public interest ie on the issue as to who owns the three tiger stripes design on the national jersey as an intellectual property, and whether it belongs to the NSC or to the defendant, Masuma.

Qualified privilege

[63] Section 12(1) of Act 286 provides:

> *Qualified privilege of newspapers*
>
> 12 (1) Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in Part I of the Schedule to this Act shall be privileged unless the publication is proved to be made with malice.

[64] Based on the court's evaluation of the evidence in relation to the defences of justification and fair comment, the court holds that in the absence of malice being proven by the plaintiff, it follows that the defendants can raise the defence of qualified privilege. The question now is whether such defence can be raised successfully.

[65] In *The Law of Defamation and the Defence of Qualified Privilege* [2013] 1 LNS (A) xiii by *Soo Siew Mei*, the learned author stated:

> To establish the defence of qualified privilege, the defendants must show that there is a legal, social or moral duty to make or publish the defamatory statement and the recipient has a corresponding interest to receive it.

[66] Again, here there is no doubt that the defendants do have a legal, social or moral duty to publish the article which contents regarding the MSN case and the proprietorship of the three tiger stripes in the national jersey is of interest to the recipients or readers of the article.

[67] In the landmark English House of Lords decision in *Reynolds v Times Newspapers Ltd and others* [1999] 4 All ER 609, the court laid down the test of responsible journalism which non-exhaustive factors to be considered include, inter alia, the steps taken to verify the information, whether comment was sought from the plaintiff and the tone of the article.

[68] The defendants clearly did not verify the information with the judge,

the plaintiff and other persons present in the court on whether those present in court were squirming in discomfort, and whether the judge was angry with the plaintiff and left the court room out of the blue.

[69] The court is of the opinion that the defendants cannot avail themselves of this defence of qualified privilege since the defendants could have gone a step further to carry out some verification before publishing the article with a dramatic and sensational slant. While I have allowed the defendants to be relieved from liability to the plaintiff on the defence of justification and fair comment, I am of the view that the defendants should practise responsible journalism and make efforts to verify facts so as to avoid any publication which can injure a person's reputation.

Whether the absence of the first defendant has prejudiced the first defendant's case

[70] The plaintiff contended that the first defendant did not produce any witnesses to testify on its behalf, including its management or even the unknown editor of the article. The second defendant is now no longer employed by the first defendant and she confirmed that she was testifying in her personal capacity. As such, counsel for the plaintiff submitted that the first defendant has not adduced any evidence to rebut the plaintiff's case. Therefore, the plaintiff's claim against the first defendant must be allowed.

[71] The court is of the opinion that even though the second defendant is no longer employed by the first defendant, the fact is that she was testifying in defence of the article written by her as the employee of the first defendant at the material time, and disputing the plaintiff's claim that it is defamatory. The first defendant's liability is dependent on whether the court finds the article defamatory or otherwise. Here, the court has found that the article is not defamatory in view of the defence of justification and fair comment which have been allowed by the court. Thus, even though the first defendant did not produce any witnesses, by virtue of the contents and strength of the second defendant's evidence, the first defendant has benefitted from such evidence. In any case, the first defendant was represented in court by its counsel. The first defendant was not directly adducing evidence by putting its representatives from its management and editorial staff in the witness stand, but the first defendant was still adducing evidence indirectly through the cross-examination of the plaintiff and his witnesses through its counsel, and through the evidence of the second defendant and Dato' Sieh.

[72] As such, there is no prejudice caused to the first defendant even if it did not produce its own witnesses. There was sufficient evidence before this court for the court to decide not only in favour of the second defendant, but also for

the first defendant.

DECISION

[73] Based on the above considerations, the court finds that the defendants are not liable for defamation of the plaintiff. Accordingly, the plaintiff's claim is dismissed. There is no order as to costs.

Plaintiff's claim dismissed with no order as to costs.

Reported by Kanesh Sundrum